UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHAD McKINNEY,

Plaintiff,

vs.

MECHELLE BONILLA, an Enrollment Manager at University of Phoenix; KYAN FLYNN, Director of Enrollment at University of Phoenix; APRIL ALCORN, an Employee Relations Consultant at University of Phoenix; CARLYN LINDSTEN, Associate Director of Enrollment at University of Phoenix; UNIVERSITY OF PHOENIX, a Corporation; APOLLO GROUP, INC., a Corporation,

Defendants.

CASE NO. 07cv2373 WQH (CAB)

ORDER

HAYES, Judge:

The matters before the Court are the Motion to Compel Mediation/Arbitration filed by Defendants University of Phoenix and Apollo Group, Inc. (Doc. # 151) and the Ex Parte Motion to Strike Defendants' Reply Due to Untimely and Improper Filing filed by Plaintiff (Doc. # 163).

BACKGROUND

This action concerns the termination of Plaintiff's employment. On December 19, 2007, Plaintiff, proceeding *pro se*, initiated this action by filing a complaint. (Doc. # 1). On

December 10, 2008, the Court granted Defendants' motion to dismiss the Complaint for failure to state a claim. (Doc. # 118). On January 12, 2009, Plaintiff filed a First Amended Complaint ("FAC"). (Doc. # 119). On April 3, 2009, the Court granted Defendants' motion to dismiss the FAC for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. # 124). On May 18, 2009 Plaintiff filed a Second Amended Complaint ("SAC"). (Doc. # 126). On May 21, 2009, Plaintiff filed an Ex Parte Motion for Leave of Court to Amend Second Amended Complaint. (Doc. # 130). On May 28, 2009, the Court granted Plaintiff's Motion. (Doc. # 134). On May 29, 2009, Plaintiff filed his Third Amended Complaint ("TAC"), which is the operative pleading in this case. (Doc. # 136). Plaintiff also filed Exhibits 1-Z18, approximately 500 pages of documents. (Doc. # 136-1–Doc. # 136-5).

The TAC alleges the following causes of action: (1) retaliation in violation of the Major Fraud Act ("MFA") of 1989; (2) retaliation in violation of the False Claims Act; (3) retaliation in violation of Title VII; (4) wrongful and constructive termination; (5) false imprisonment; (6) intentional infliction of emotional distress; (7) defamation; (8) violation of the Equal Pay Act ("EPA"); (9) violation of the Labor Management Relations Act ("LMRA") of 1947; (10) violation of the California Whistleblower Protection Act ("CWPA"); (11) breach of the implied covenant of good faith and fair dealing; and (12) wrongful termination in violation of public policy.

On January 28, 2010, the Court granted Defendants' motion to dismiss the TAC as to Plaintiff's first claim for retaliation in violation of the Major Frauds Act, second claim for retaliation in violation of the False Claims Act as to Plaintiff's claims about the Do-Not-Call Act and the Higher Education Opportunity Act of 2008, third claim for violations of Title VII, fifth claim for false imprisonment, sixth claim for intentional infliction of emotional distress, seventh claim for defamation, eighth claim for violation of the Equal Pay Act, ninth claim for violation of the Labor Management Relations Act, tenth claim for violation of the California Whistleblower Protection Act, eleventh claim for breach of the implied covenant of good faith and fair dealing, and twelfth claim to the extent it claims information about benefits and retirement converted him from an at will employee to a contractual employee. (Doc. # 149 at

23). The Court denied Defendants' motion to dismiss the TAC as to Plaintiff's second claim for retaliation in violation of the False Claims Act as it pertains to the Higher Education Act's incentive compensation ban and fourth claim for wrongful termination in violation of public policy.[1] *Id.*

On February 18, 2010, Defendants University of Phoenix and Apollo Group, Inc. (hereinafter "Defendants") filed their Motion to Compel Mediation/Arbitration. (Doc. # 151). On March 17, 2010, Plaintiff filed a "Notice of Motion and Opposition to Defendants' Motion to Compel Mediation/Arbitration." (Doc. # 160). On March 23, 2010, Defendants filed their reply in support of their Motion to Compel Mediation/Arbitration. (Doc. # 161). On March 26, 2010, Plaintiff filed an "Ex Parte Notice of Non-Opposition to His Motion and Opposition to Defendants' Motion to Compel Mediation/Arbitration." (Doc. # 162). On the same date, Plaintiff filed an "Ex Parte Notice of Motion and Opposition to Defendants' Reply in Support of Motion to Compel Mediation/Arbitration Due to Untimely and Improper Filing of Pleading" which the Court construes as an ex parte motion to strike Defendants' reply brief. (Doc. # 163).

CONTENTIONS OF THE PARTIES

Defendants contend that Plaintiff "signed a valid agreement which requires that he mediate and then, if necessary, arbitrate all disputes with his former employer." (Doc. # 151-1 at 2). Defendants contend that employment disputes are generally arbitrable. *Id.* at 7. Defendants contend that Plaintiff agreed to be bound by the company arbitration agreement on two occasions while he was working for Defendants. *Id.* at 9. Defendants contend that this action should therefore be stayed. *Id.* at 12. In support of their motion, Defendants submit the declaration of Matthew Mitchell, the Legal and Associate General Counsel of the University of Phoenix, who states he reviewed Plaintiff's personnel file. (Doc. # 154-1 at 2). Mitchell states that Plaintiff "has acknowledged receiving several [University of Phoenix] documents by electronic signature, which is individually password protected and is a common practice at

[1] The Court also held that Plaintiff's twelfth claim for wrongful termination in violation of public policy was partially duplicative of Plaintiff's fourth claim.

[the University of Phoenix]." *Id.* Mitchell states Plaintiff electronically signed a document attesting that he had received and consented to the arbitration agreement on August 14, 2006 and consented to an updated version of the agreement on January 15, 2007. *Id.* Both versions of the arbitration agreement are attached to Mitchell's declaration along with print-outs of Plaintiff's electronic signature on an accompanying form for each version. *Id.* at 151-5. The agreements include a series of internal dispute resolution procedures followed by mandatory mediation and binding arbitration. *Id.*

In his opposition, Plaintiff contends that he did not sign any agreement to arbitrate. (Doc. # 160 at 3). Plaintiff contends that the documents submitted by Defendants are "a forgery." *Id.* at 6. Plaintiff contends that he was never given these "document[s] to sign and agree to in printed or electronic form by his former employer. He was only granted access to it via the company website." *Id.* Plaintiff contends that a contract to arbitrate would be unconstitutional. *Id.* at 7. Plaintiff contends that he "had no opportunity to negotiate this alleged agreement [and] it was thus invalid as there was not a modicum of bilaterality exercised in its construction or institution upon Plaintiff . . . ." *Id.* at 10. Plaintiff contends the agreement is "illusory and unenforceable" because Defendants "reserved the right to alter the handbook's provisions at its sole discretion without notice to, or approval of the employee." *Id.* at 12. Plaintiff contends that Defendants have skipped a required step of the process outlined in the agreement. *Id.* at 13. Plaintiff contends that the "Federal Arbitration Act does not govern employment contracts." *Id.* at 16. Plaintiff contends that Defendants waived the arbitration agreement. *Id.* Plaintiff contends that the arbitration agreement violates California law because it does not provide for neutral arbitrators, does not allow more than minimal discovery, does not require a written award, does not provide for all types of relief that would be available in court, and because it requires employees to pay arbitrators' fees or unreasonable costs. *Id.* at 18. Plaintiff contends that this dispute is "beyond the scope" of the arbitration agreement because Plaintiff alleged fraud on the government, not merely a personnel dispute. *Id.* at 26.

In their reply, Defendants contend that Plaintiff "cannot use his own lack of diligence

to the extent he failed to actually read the Employee Handbook to avoid the" arbitration agreement. (Doc. # 161 at 3). Defendants contend that Plaintiff must have had knowledge of the Employee Handbook containing the agreement because he submitted it to the Court attached to his TAC. *Id.* Defendants contend that even if Plaintiff's electronic signature is forged, it is irrelevant because "no signature is required to make an arbitration agreement enforceable." *Id.* Defendants contend that Plaintiff's claims all fall within the scope of the arbitration agreement because the claims stem from alleged retaliation and wrongful termination. *Id.* at 4-5. Defendants contend the arbitration agreement satisfies the requirements established by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs. Inc.*, 24 Cal. 4th 83 (2000). Defendants contend that the arbitration agreement incorporates the rules of the Federal Arbitration Act which require neutral arbitrators. *Id.* at 6. Defendants contend that the agreement also provides for adequate discovery because under California law, an arbitration agreement which is silent on the issue of discovery will be interpreted to imply sufficient discovery. *Id.* Defendants contend that the arbitration agreement incorporates arbitration rules which require a written decision. *Id.* at 7. Defendants contend that there are no restrictions on the available remedies. *Id.* Defendants contend that the agreement provides that Plaintiff will not bear the costs of the arbitration. *Id.* Defendants contend that the agreement is mutual because it requires both the employee and the employer to submit their claims to arbitration. *Id.* at 8. Defendants contend that the agreement is neither procedurally or substantively unconscionable. *Id.* Defendants contend that a clause allowing an employer to unilaterally alter the agreement without the "employee's express knowledge and consent" is not prohibited under California law. *Id.* Defendants contend that any unconscionable provision is severable. *Id.* at 9. Defendants contend that they did not waive their right to compel arbitration. *Id.* Finally, Defendants contend Plaintiff is not entitled to a jury trial as to whether the arbitration agreement applies because he "did not even submit any declarations." *Id.* at 11.

Plaintiff filed a notice of non-opposition asserting Defendants failed to timely file their reply. (Doc. # 162). Plaintiff asserts that his opposition was a motion and that Defendants

failure to timely file the reply is a concession that his motion should be granted. *Id.* at 2-3. Plaintiff also filed a motion to strike the reply as untimely and improper in form. (Doc. # 163). Defendants filed an opposition to Plaintiff's motion (Doc. # 164), which contends Defendants have good cause for their late filing, and an opposition to Plaintiff's notice of non-opposition which contends that filing is improper (Doc. # 165). Plaintiff filed a reply which contends that Defendants should have filed a motion for an extension of time to file their reply in support of the motion to compel arbitration (Doc. # 161) and that Defendants' reply should be struck. (Doc. # 167). Finally, Plaintiff filed a document which requests that if the Court accepts the late-filed reply brief in support of Defendants' motion to compel arbitration, the Court grant Plaintiff seven days to respond to the contentions raised by that brief. (Doc. # 169).

ANALYSIS

I. ARBITRATION AGREEMENT

Two different versions of the arbitration agreement, called the Dispute Resolution Policy and Procedure, applied during Plaintiff's employment with Defendants. *See* Doc. # 151-5. The first was in effect when Plaintiff began working for Defendants in August of 2006. *See* Dispute Resolution Policy and Procedure, Version 15, Doc. # 151-5 at 3-7. The second went into effect in January of 2007. *See* Dispute Resolution Policy and Procedure, Version 16, Doc. # 151-5 at 8-13. The Dispute Resolution Policy and Procedure documents were each accompanied by Employee Handbook Acknowledgment Forms which contain additional terms. Doc. # 151-5 at 3, 8. The Dispute Resolution Policy and Procedure creates a multi-step process beginning with internal dispute resolution measures and culminating in mandatory mediation followed by binding arbitration. *See id.* at 3-13. The two Dispute Resolution Policy and Procedure documents each contain a provision which states:

> This policy is intended to create the exclusive means by which claims asserted by either an employee or the Company, involving the interpretation and/or application of this Employee Handbook or any other personnel related dispute, shall be decided and finally resolved. . . . All covered disputes shall be resolved pursuant to these procedures and the result is final and binding on both the Company and the employee.

Id. at 4, 9. This language makes clear that the agreements are intended to be binding

arbitration agreements rather than optional alternatives to litigation.

Pursuant to the "primary substantive provision of the [Federal Arbitration] Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp*, 460 U.S. 1, 24 (1983), arbitration agreements are generally enforceable in federal courts:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Federal Arbitration Act "reflects the fundamental principle that arbitration is a matter of contract . . . plac[ing] arbitration agreements on equal footing with other contracts and requires courts to enforce them according to their terms." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. __, No. 09-497, *slip op.* at 3 (June 21, 2010). As with other contracts, arbitration agreements are subject to "generally applicable contract defenses such as fraud, duress, or unconscionability." *Doctor's Assoc. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Employment disputes are arbitrable under the Federal Arbitration Act. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

In the absence of a provision in the arbitration agreement stating otherwise, the question of whether a particular dispute is arbitrable is to be decided by the courts, not the arbitrator. *Rent-A-Center*, No. 09-497, *slip op.* at 8-9; *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). If there is a valid arbitration agreement which applies to the dispute, the court "shall" order arbitration pursuant to 9 U.S.C. § 4. In determining whether a dispute is arbitrable, courts must apply a standard similar to the summary judgment standard. *See Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003). The court must review the record and determine whether there are material disputes of fact that require a jury to determine whether the dispute is arbitrable. 9 U.S.C. § 4; *see Bensadoun*, 316 F.3d at 175. If there are no material disputes of fact that require a jury to make factual determinations, the court must determine whether the agreement is an enforceable contract. *See Rent-A-Center*, No. 09-497, *slip op.* at 4. Whether an arbitration agreement is an enforceable contract is a question of state law. *See Omstead v.*

Dell, 594 F.3d 1081, 1085 (9th Cir. 2010).

Neither party asserts that the arbitration agreement requires arbitration of arbitrability and there is no contractual term mandating arbitration of arbitrability. Therefore, this Court must determine whether a valid, binding arbitration agreement exists, and if so, whether it is applicable to this dispute. *See Rent-A-Center*, No. 09-497, *slip op.* at 5; *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004).

Plaintiff contends the contract is unenforceable because it is unconscionable. In analyzing whether a contract is unconscionable under California law, a court applies a two-pronged test. *See Soltani v. Western & Southern Life Insurance Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001). The first prong is procedural unconscionability. *Id.* A contract is procedurally unconscionable if it is a contract of adhesion which an employee was required to sign as a condition of employment without negotiation. *Id.* Defendants concede that the arbitration agreement was imposed as a condition of employment and it is clear from the face of the agreement and the accompanying documents that the contract is a form contract which was not negotiated by Plaintiff. *See* Doc. # 161 (Defendant's reply conceding the agreement "was imposed as a condition of [Plaintiff's] employment"); Doc. # 151-5 at 3, 8 (Employee Handbook Acknowledgment Form). The Court finds that the contract was procedurally unconscionable.

The second prong is substantive unconscionability. *Soltani*, 258 F.3d at 1043. "Substantive unconscionability relates to the effect of the contract or provision" being challenged. *Id.* "Substantive unconscionability centers on the 'terms of the agreement and whether those terms are so one-sided as to shock the conscience.'" *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (quoting *Kinney v. United HealthCare Servs. Inc.*, 70 Cal. App. 4th 1322, 1330 (1999)). The court must examine the contract "as of the time it was made." *Id.* (internal citations omitted).

> Both [procedural and substantive unconscionability must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked . . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice

versa.

Soltani, 258 F.3d at 1043 (quoting *Armendariz*, 24 Cal. 4th at 114-15).

Several provisions of the arbitration agreement are substantively unconscionable as a matter of California law. The Court will address each of the provisions below.

(1) Unilateral Right to Alter the Contract

The Employee Handbook Acknowledgment Forms both include a clause which states:

> Since the information, policies, and benefits in the Handbook are necessarily subject to change, I acknowledge that revisions may occur and I understand such revisions may supersede, modify or eliminate existing policies. I further understand and agree that I will be bound by any such revisions during the term of my employment with Apollo Group, Inc.

While Defendants assert that under California law, "an employer can terminate or modify a unilateral employment contract without employee's express knowledge and consent," in fact, California law requires "reasonable notice of the change" and consent in the form of remaining with the employer before a modification of an employment contract is effective. *See Asmus v. Pacific Bell*, 23 Cal. 4th 1, 13 (2000). Continued employment is also required as consideration for the new contract formed by the modification. *Id.* The clause in this contract, however, requires the employee to consent in advance to be bound by any revisions without prior notice, which does not comply with California law.

By including the clause allowing unilateral changes without notice, the Employee Handbook Acknowledgment Form suggested that the form was not a contract at all. In interpreting a similar clause, the Ninth Circuit held that such a clause implied that an employee handbook "contained a set of non-contractual policies unilaterally established" by the employer rather than a bilateral contract waiving the right to litigate claims in court. *See Kummetz v. Tech Mold*, 152 F.3d 1153, 1155 (9th Cir. 1998). The Ninth Circuit refused to enforce the arbitration agreement on those grounds. *Id.* Unlike the agreement in *Kummetz*, additional language in Defendants' Dispute Resolution Policy and Procedure document makes clear that by agreeing to arbitration, the employee is waiving access to the courts. *See id.* In *Kummetz*, the Ninth Circuit noted that the "Acknowledgment failed to alert Kummetz to the fact that the information book contained an arbitration clause," *id.* at 1156, whereas

Defendant's Employee Handbook Acknowledgment Forms state that the employee "specifically agree[s] to abide by the policies as set forth in the Employee Handbook . . . including the following sections" and list the Dispute Resolution Policy and Procedure, *see* Doc. # 151-5 at 3, 8. While this clause alone, read in the context of the rest of the agreement, may not render the entire arbitration agreement invalid as it did in *Kummetz*, the clause is unenforceable under California law and is substantively unconscionable.

(2) Internal Dispute Resolution

Both versions of the Dispute Resolution Policy and Procedure in effect during Plaintiff's employment with Defendant contain internal dispute resolution procedures. Doc. # 151-5 at 4-5, 9-11. The procedures differ slightly from Version 15 to Version 16. *Id.* Under both versions, the employee must first attempt "informal resolution" with a supervisor if feasible. *Id.* The employee must then submit the dispute to "the Company's Senior Management" if the first attempt at informal resolution fails. *Id.* This second step must be taken "as soon as practical, but in no event more than 30 calendar days after learning of the problem." *Id.* at 5, 11. The employee must submit a "written dispute" which "clearly and concisely identif[ies] what the problem is and what resolution the employee or Company seeks." *Id.* If the employee is not satisfied with the outcome, the third step requires the employee to present his claims to a three-member panel of employees who investigate and make a recommendation to the President of Apollo Group, Inc., who issues a "final Company determination." *Id.*. Under Version 16, the later version of the agreement, the employee must also attempt informal resolution with the Office of Ombuds Services ("OO"). *Id.* at 10. Under both versions, the employee is required to complete the internal dispute resolution procedures prior to mandatory mediation and arbitration. *Id.*

In *Nyulassy*, a California Court of Appeals analyzed a provision which "requires [the employee] to submit to discussions with his supervisors in advance of, and as a condition precedent to having his dispute resolved through binding arbitration." *Nyulassy v. Lockheed Martin Corporation*, 120 Cal. App. 4th 1267, 1282-83 (2004). The court in *Nyulassy* concluded:

> While on its face, this provision may present a laudable mechanism for resolving employment disputes informally, it connotes a less benign goal. Given the unilateral nature of the arbitration agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggests that defendant would receive a 'free peek' at plaintiff's case, thereby obtaining an advantage if and when plaintiff were to later demand arbitration.

Id. at 1282-83.

Although the Dispute Resolution Policy and Procedure documents created by Defendant in this case state that the entire policy is applicable to claims raised by either Defendant or an employee, *see* Doc. # 151-5 at 4, 9, it is difficult to see how the internal dispute resolution mechanisms could apply to claims raised by Defendant. Requiring Defendant to seek the approval of its senior management and president prior to mandatory mediation and binding arbitration imposes no burden on Defendant while requiring Plaintiff to reveal the details of his case prior to reaching a neutral mediator, rendering the provision unconscionable pursuant to *Nyulassy*. Further, the sheer number of steps to the procedure prior to reaching a neutral mediator–at least two mandatory steps in all cases, three where it is "feasible" to attempt to resolve the problem with a supervisor, and four under Version 16 which includes additional informal resolution with OO–suggests that the internal dispute resolution procedures serve largely to create a series of hurdles to be cleared so that only the most persistent employees will ever reach a decision maker outside of the company.

For instance, while the full internal procedures purport to be applicable to both parties, employees are sometimes required to complete one or two additional steps that are not required of the employer. *See* Doc. # 151-5 at 5, 9-10. Under both Version 15 and Version 16, the employee must attempt to resolve the dispute with his direct supervisor where such resolution is "feasible." *Id.* at 4, 9. The language of the contract, which states that "the *employee*" should attempt "Step One" of the internal dispute resolution procedures if it is feasible before he may proceed, is overt that the employer is *not* required to attempt informal resolution directly with the employee before proceeding. *See id.* (emphasis added). Under Version 16, there is an *additional* part of "Step One" which the employee must complete *after* discussing the problem with a direct supervisor before proceeding with more formal internal

dispute resolution procedures, which is informal resolution through the OO. *See id.* at 10. The OO, however, has no power to resolve disputes, and serves only to "facilitate communication when conflict arises." *Id.* Although the OO is "neutral" according to Version 16, it is part of Defendant. *Id.* While some permissive language suggests this step is optional, mandatory language at the end of Step One in Version 16 only allows the employee to bypass this procedure "if an informal resolution is still not feasible." *Id.*

Defendants' internal dispute resolution procedure presents an additional problem—a clause which states "[n]o outside representatives of either party shall be permitted to participate in these interviews or in deliberations with the Committee" of employees which investigates the claims and makes a recommendation to the President of Apollo Group, Inc. The "outside representatives" clause effectively bars Plaintiff from being represented by counsel at this stage of the proceedings and allows Defendants a significant and unfair advantage. Defendants are the more sophisticated party and will be better able to protect their interests, even without the benefit of attorneys. However, the phrasing of the clause, which bars "*outside* representatives" allows Defendants to have in-house counsel present during an interview that the employee is required to submit to and at the deliberations of the Committee of employees. This clause heightens the danger that the internal dispute resolution procedure serves to obtain an advantage in future mediation and arbitration proceedings. Barring employees from being represented by counsel during an interview by company employees while allowing the employer to be represented by its in-house counsel serves no legitimate business purpose and may result in relatively unsophisticated employees attempting to pursue their disputes with no knowledge of their legal rights and no one to advocate for them.

(3) Thirty Day Deadline to Report Disputes and Ten Day Deadline to Appeal Internally

In addition to the requirement that an employee must submit a "written dispute" to the Senior Manager "in no event more than 30 days after learning of the problem," the Dispute Resolution Policy and Procedure also requires that an employee "appeal in writing to the President of Apollo Group, Inc. within ten working days of receipt of the Senior Manager's written decision" if the employee is dissatisfied. (Doc. # 151-5 at 5, 11). The agreement does not state the consequence for filing outside these time periods, but since these internal dispute

resolution procedures must be exhausted and the language in the 30-day clause that the employee may "in no event" wait more than 30 days to submit the dispute to the senior manager in writing, it appears to the Court that failure to meet these deadlines may result in forfeiture of otherwise meritorious claims. *See id.* Such a provision is unconscionable as a matter of California law, particularly when applied to a claim of an ongoing violation of "employment-related statute[s]." *See Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1077 (9th Cir. 2007). Because claims based on ongoing violations are generally only brought by employees, this provision would allow the employer to "insulate[] itself from potential damages" while requiring an employee to "forgo the possibility of relief," which renders the provision so one-sided as to be substantively unconscionable. *Id.* (citation omitted).

Although courts have previously held that six-month or one-year limits are unconscionable because they bar ongoing violation claims, *see id.* at 1076-78, a thirty-day period is so short that it is unconscionable even as applied to discrete violations. The more sophisticated employer is more likely to immediately recognize causes of action based on acts of the employee, allowing it to bring its claims within thirty days.[2] While the employer already has immediate access to counsel for legal advice if it is uncertain as to its legal rights in relation to an act of the employee, employees do not generally have such ready access to counsel. If an aggrieved employee is uncertain whether he has a claim, it may take the employee more than thirty days to retain counsel and determine whether an act by the employer violated the employee's statutory rights. If an employee has a general sense that he has been wronged but lacks the sophistication to determine what legal claims he should bring, even if he complies with the thirty-day deadline to file a dispute in writing, he may fail to bring the correct claims during this internal resolution period and waive his right to assert meritorious claims later in the proceedings after obtaining counsel.

The Court has found no California case-law addressing a ten-day period to appeal an internal decision, however, as Defendants have advanced no "business justification" for this

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[2] The Court, for the purposes of this analysis, is leaving aside the additional problem that it is not clear how the internal dispute resolution could be applied to the Company's claims against employees as discussed above.

limitation, the Court finds that this clause is also unconscionable. As with the thirty-day period to lodge a complaint in writing, this very brief window to pursue claims internally functions as a trap for the unwary, limits the employee's ability to consult counsel, and appears to serve no legitimate purpose.

(4) Unavailability of Attorney's Fees

Under both versions of the Dispute Resolution Policy and Procedure, after the internal phase of the dispute resolution, an employee must submit to mandatory mediation prior to binding arbitration. Although the employee may be "represented by counsel of his or her choosing" the representation is at the employee's own expense. (Doc. # 151-5 at 6, 12). This clause limits the ability of an arbitrator to subsequently award attorney's fees on the same basis that they would be awarded in litigation, which is unconscionable under California law. *See Armendariz*, 24 Cal. 4th at 101. Under many statutes designed to protect employee rights, if the employee is successful in litigation, attorney's fees are recoverable, which is integral to "advanc[ing such] statute[s'] goals." *Id.* Although an arbitrator could award attorney's fees incurred in the course of the arbitration itself, the arbitrator could not award attorney's fees incurred at the mediation phase in light of the clause that states such representation is at the employee's own expense. "An arbitration agreement cannot . . . serve as a vehicle for the waiver of statutory rights" and "may not limit statutorily imposed remedies such as punitive damages and attorney's fees . . . ." *Id.* at 101, 103. Such a limitation "is contrary to public policy and unlawful." *Id.* at 104.

(5) Risk that Employee Must Bear Substantial Costs

Under both versions of the Dispute Resolution Policy and Procedure, when a dispute finally reaches an arbitrator, an employee must make a one-time payment towards the expenses "equal to the filing fee then required by the court of general jurisdiction in the state where the employee in question works . . . ." (Doc. # 151-5 at 6, 12). However, this provision is overridden by "any conflicting rules of the American Arbitration Association then in effect," which creates the possibility that the employee will have to bear costs beyond those which would be incurred in litigation pursuant to the rules of a private association. *Id.* An additional provision states that the arbitrator may subsequently award costs to the company,

even where the American Arbitration Association's rules would not otherwise allow it. *Id.* "The risk that a claimant may bear substantial costs of arbitration, not just the actual imposition of costs, may discourage an employee from exercising the constitutional right of due process," rendering the provision unconscionable under California law. *See Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107, 116 (2004) (citing *Armendariz*, 24 Cal. 4th at 110).

(6) Severability

Once a court has determined that an arbitration agreement contains unconscionable provisions, it must determine whether those provisions are severable. *Id.* In making this determination, "a court cannot rewrite the arbitration agreement for the parties," so if the unconscionable clauses cannot be "stricken or excised without gutting the agreement," an arbitration agreement is unenforceable. *Davis*, 485 F.3d at 1084. The Court has identified numerous provisions which are unconscionable: the unilateral right to alter the agreement, the entirety of the internal dispute resolution procedures, the deadline to bring claims to Defendants' attention, the bar on "outside representatives" during Defendants' investigation, the unavailability of statutorily mandated attorney's fees, and the risk that the employee will have to bear substantial costs under two different provisions. The Court concludes that the number and scope of these unconscionable provisions renders the agreement unenforceable. Defendants' Motion to Compel Mediation/Arbitration is denied.

II. MOTION TO STRIKE

Although Defendants filed their reply (Doc. # 161) after the deadline set by the local rules, the Court finds that they had good cause to do so because Plaintiff's opposition (Doc. # 160) was untimely. Plaintiff's Motion to Strike is denied.

CONCLUSION

IT IS HEREBY ORDERED THAT:

(1) The Motion to Compel Mediation/Arbitration filed by Defendants University of Phoenix and Apollo Group, Inc. (Doc. # 151) is **DENIED**.

(2) The Ex Parte Motion to Strike Defendants' Reply Due to Untimely and Improper Filing (Doc. # 163) is **DENIED**.

DATED: 7/16/10

WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE